

FILED & ENTERED

OCT 26 2012

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gae DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re

CATHERINE Z. CASS,

Debtor.

CHARLES W. DAFF, Chapter 7 Trustee,

Plaintiff,

vs.

**JAMES WALLACE and REBECCA
WALLACE; GLORIA SUESS,**

Defendants.

Case No. 2:12-bk-16090-RK

Chapter 7

Adv. No. 2:12-ap-01235-RK

**ORDER DENYING PLAINTIFF'S
MOTION FOR STAY PENDING APPEAL**

On October 5, 2012, this court entered its judgment in favor of Defendants James Wallace, Rebecca Wallace, and Gloria Suess ("Defendants") and against Plaintiff, Charles W. Daff, Chapter 7 Trustee ("Trustee") in the above-captioned adversary proceeding. On October 9, 2012, Trustee filed a Notice of Appeal to the Bankruptcy Appellate Panel of the Ninth Circuit, appealing the judgment. On the same day, Trustee filed a Motion for Stay Pending Appeal pursuant to Federal Rule of Bankruptcy Procedure 8005 (the "Motion").

1 After careful consideration of the written arguments of the parties, the court
2 dispenses with oral argument, vacates the hearing on October 30, 2012, and now takes
3 the request for stay pending appeal under submission and rules on the Motion.

4 A stay pending appeal is not a matter of right, but instead an exercise of judicial
5 discretion dependent on the facts and circumstances of the particular case. *Nken v.*
6 *Holder*, 556 U.S. 418, 433-434 (2009) (citations omitted); accord, *Lair v. Bullock*, ___ F.3d
7 ___, 2012 WL 4883247 (9th Cir., opinion filed Oct. 16, 2012)(citations omitted). The party
8 requesting a stay pending appeal bears the burden of showing that the circumstances
9 justify the exercise of judicial discretion. *Nken v. Holder*, 556 U.S. at 433-434. To meet
10 this burden, the moving party must make such a showing based on the following four
11 factors: (1) whether the movant has made a strong showing that he is likely to succeed
12 on the merits; (2) whether the movant will suffer irreparable injury absent a stay;
13 (3) whether the issuance of a stay would substantially injure the other parties interested
14 in the proceeding; and (4) where the public interest lies. *Id.* at 434. The first two factors
15 are the most critical. *Id.* It is not sufficient that the chance of success on the merits be
16 “better than negligible.” *Id.* Additionally, a simple showing of “possibility of irreparable
17 injury” is not sufficient. *Id.* at 434-435.

18 As discussed below, the court concludes that Trustee in his papers requesting
19 stay pending appeal has failed to show that the circumstances of this case warrant the
20 court’s exercise of discretion based on the factors stated in *Nken* to issue a stay pending
21 appeal.

22 Trustee argues that he has demonstrated a strong likelihood of success on the
23 merits. Although Trustee essentially reasserts the same legal arguments that the court
24 rejected as discussed in the memorandum decision supporting the judgment, *Daff v.*
25 *Wallace (In re Cass)*, 476 B.R. 602 (Bankr. C.D. Cal. 2012), and argues that he has a
26 “substantial possibility of success” on appeal, though mere possibility of success on
27 appeal is generally insufficient as stated in *Nken*, it appears that Trustee has raised
28 “serious legal questions” to constitute a “substantial case for relief on the merits” to meet

1 the standard of likely success applied in this circuit after *Nken*. *Lair v. Bullock*, 2012 WL
2 4883247, at *3, citing, *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per
3 curiam).

4 However, the court concludes that Trustee has not demonstrated that he will suffer
5 irreparable injury because any "injury" is reparable by a monetary award and there is no
6 competent evidence to establish that the appellees would dissipate the funds. The
7 evidence in the moving papers only suggests the possibility of irreparable harm, which is
8 inadequate. *Nken v. Holder*, 556 U.S. at 434-435.

9 The parties in their papers did not argue, or present evidence, on the other *Nken*
10 factors, and the court determines that such factors are not determinative of whether the
11 court should exercise its discretion to grant a stay pending appeal.

12 Because of the insufficient showing of irreparable harm and lack of other factors
13 warranting the exercise of judicial discretion to issue a stay pending appeal, this court
14 hereby denies Trustee's request for stay pending appeal. This denial is, of course,
15 without prejudice to Trustee's right to request a stay pending appeal from an appellate
16 court.

17 IT IS SO ORDERED.

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24 DATED: October 26, 2012

25 United States Bankruptcy Judge
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NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **ORDER DENYING PLAINTIFF'S MOTION FOR STAY PENDING APPEAL** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **October 26, 2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

Charles W Daff (TR) cdaff@epiqtrustee.com, cdaff@ecf.epiqsystems.com;c122@ecfcbis.com
D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com
Martina A Slocomb mslocomb@marshackhays.com, ecfmarshackhays@gmail.com
United States Trustee (SA) ustpreion16.sa.ecf@usdoj.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

David B Dimitruk
5 Corporate Park Ste 220
Irvine, CA 92606

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: